KRISHNAMURTHY NAGARATNAM

v.

MAYBAN FINANCE BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[COMMERCIAL DIVISION NO. D2-43-5528-87]
11 NOVEMBER 1989

BANKRUPTCY: *Application for an order that the receiving and adjudication orders made on 10 March 1989 be rescinded and annulled - Whether notice which did not specify the amount due was defective - Whether application to set aside the bankruptcy notice filed on 3 November 1987 means that no act of bankruptcy has been committed.*

This was an application by notice of motion for an order that the receiving and adjudication orders made against the applicant on 10 March 1989 be rescinded and annulled. Counsel for applicant stated that the bankruptcy notice was defective as the amount due as of the date of the bankruptcy notice (7 October 1987) were not specified. The amount of interest noted in the notice was calculated up to February 1987. The second ground which was relied upon by the Counsel was that no act of bankruptcy has been committed by the applicant because on 3 November 1987 he had filed an application to set aside the bankruptcy notice.

Held:

[1] According to r. 91(1) of the Bankruptcy Rule 1969, a bankruptcy notice is issued by the Court. The judgment creditor had to apply to the Registrar to issue notice and when making the application the creditor had to file the notice together with request for issue (r. 92(b)). In the present case, the request for issue of bankruptcy notice was addressed to the Senior Assistant Registrar and filed in the Court Registry. Since the bankruptcy notice was issued and dated by the Senior Assistant Registrar it cannot be expected that the judgment creditor could quantify the amount claimed as at the date of the bankruptcy notice as he would not know when the SAR was going to issue the notice. The "further interest" claimed at the bottom of the notice did not render the notice defective.

[2] Rule 95(2) of the Bankruptcy Rule 1969 state that if an application to set aside the bankruptcy notice cannot be heard before the time specified in the notice for compliance with its requirements. The Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined. The application to set aside the bankruptcy notice was filed on 3 November 1987 but the date of hearing of the application given by the SAR. was 20 June 1988.

[3] There is no evidence that the applicant applied for extension of the seven days period as stated in the notice and there is no evidence that the SAR had granted such extension. On 10 March 1989, after having being postponed twice, again the applicant asked for adjournment. On that date the application to set aside the bankruptcy notice was not mentioned at all.

[4] In the circumstances, it was too late for the applicant to raise the issue of the hearing of his application to set aside the bankruptcy notice at the hearing of the application to rescind and annul the receiving and adjudicating orders. In any event the affidavit in support of the application to set aside the bankruptcy notice failed to disclose that the applicant had a counter-claim, set-off or cross demand which was equal to or which exceeded the sum stated in the notice.

[5] Since the applicant failed to pay the sum demanded in the bankruptcy notice, the applicant had committed an act of bankruptcy, and as such the motion was dismissed with costs.

[Application dismissed.]

Cases referred to:
Ghazali bin Mat Noor v. Southern Bank Berhad [1989] 1 CLJ (Rep) 35
Re The Bankruptcy Act 1966; Ex parte Commercial Banking Company of Sydney Ltd. 23 ACL 522
Re Sly; Ex parte Broadlands International Finance Ltd. 79 ALR 681
Ex parte May [1884] 12 QBD 497

Legislation referred to:
Bankruptcy Act 1966 [Aust], s. 41(1)(b)
Bankruptcy Rules 1969, rr. 91(1), 92(b), 95(2)

For the judgment creditor - YM Tunku Alina bt. Raja M. Alias; M/s. Skrine & Co.
For the judgment debtor - N. Krishnamurthy

JUDGMENT

Zakaria Yatim J:

This was an application by notice of motion for an order that the receiving and adjudication orders made against the applicant on 10 March 1989 be rescinded and annulled.

The applicant, in his affidavit affirmed on 16 August 1989 stated seven grounds in support of his application. At the hearing of the application, his Counsel, Mr. Ranjan relied only on two grounds and abandoned the other five grounds.

One of the grounds relied upon by Mr. Ranjan was that the amount due as of the date of the bankruptcy notice, that is 7 October 1987 was not specified. According to him the amount of interest stated in the notice was calculated up to 28 February 1987. In support of his argument he cited the recent Supreme Court decision in *Ghazali bin Mat Noor v. Southern Bank Berhad* [1989] 1 CLJ (Rep) 35, where it was stated that "For a bankruptcy notice to be valid ... it should state the exact amount due as at the date of the bankruptcy notice.

Y.M. Tunku Alina, Counsel for the judgment creditor submitted that the date of the bankruptcy notice, that is 7 October 1987, was given by the Court Registry. She said that the demand made in the notice was quantified up to 28 February 1987 and accordingly the bankruptcy notice was not defective.

In order to consider this question it is relevant to examine the bankruptcy notice. The bankruptcy notice, which was addressed to the judgment debtor, stated:

> Take Notice that within seven (7) days after the service of this notice on you excluding the day of such service, you must pay to Mayban Finance Berhad (formerly known as the Malayan Finance Corporation Berhad) of No. 1, Medan Tuanku Satu, 50300 Kuala Lumpur, the sum of RM30,628.68 (Ringgit Thirty Thousand Six Hundred and Twenty-eight and sen Sixty-eight) claimed by them as being the amount due on a final judgment and taxed costs (Allocatur dated 25 November 1986 pursuant to a final order obtained by them against you in the High Court of Malaya at Kuala Lumpur dated 24 May 1986) whereon execution has not been stayed, or you must secure or compound for the said sum to their satisfaction or the satisfaction of the Court or you must satisfy the Court that you have a counterclaim, set off or cross demand against them which equals or exceeds the sum claimed by them, and which you could not set up in the action in which the said judgment was obtained.
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> **Particulars of Claim**

(1) Principal sum as per judgment dated 24 May 1986 in civil suit no. C3232 of 1983. RM21,801.30

(2) Interest on RM21,801.30 at the rate of 8% per annum from 6 December 1987 (1,181 days) 5,643.25 RM27,444.55

(3) Costs as per Allocator dated 25 November 1986 in civil suit no. C3232 of 1983 2,999.40 RM30,628.68

With further interest on:

(a) RM21,801.30 at the rate of 8% per annum from 1 March 1987 to the date of final payment or of receiving and adjudication orders, and the costs of these proceedings; and

(b) RM2,999.40 at the rate of 8% per annum from 1 March 1987 to the date of final payment or of receiving and adjudication orders, and the costs of these proceedings;

Dated this day of 7 October 1987

By the Court,
Sgd/-
Senior Assistant Registrar,
High Court, Kuala Lumpur.

Under r. 91(1) of the Bankruptcy Rules 1969 a bankruptcy notice is issued by the Court, that is the Registrar (see r. 3(a)). The judgment creditor had to apply to the Registrar to issue the notice and when making the application the creditor had to file the notice together with a request for issue. (See r. 92(b)).

In the present case the request for issue of bankruptcy notice was addressed to the Senior Assistant Registrar and filed in the Court Registry. The bankruptcy notice was signed by the Senior Assistant Registrar and since the notice was issued by the Senior Assistant Registrar, the date of the notice that is 7 October 1987 must be given by the Senior Assistant Registrar. Rule 91(1) is similar to s. 41(1)(b) of the Australian Bankruptcy Act 1966 which states, "A bankruptcy notice - (b) shall be issued by the Registrar". In *Re Farrugia: Ex parte Deputy Commissioner of Taxation (NSW)* 80 ALR 651, the Federal Court of Australia comprising three Judges, on its judgment at p. 666, stated:

> It must be kept in mind that a bankruptcy notice is the document of the Registrar, not of the creditor who seeks its issue. It is dated by the Registrar, not the creditor. It is the Registrar who issue it (Section 41(1)(b) ... and the Registrar who signs it and issues it only when he is satisfied that the application has been 'duly' made and that the bankruptcy notice is in order for signature ...

In my opinion the passage quoted above applies in the present case.

Since the bankruptcy notice was issued and dated by the Senior Assistant Registrar it cannot be expected that the judgment creditor could quantify the amount claimed as at the date of the bankruptcy notice as he would not know when the Senior Assistant Registrar was going to issue the notice. In my opinion it was proper for the judgment creditor to state the amount due plus interest as at 28 February 1987, a date which was earlier than the date of the bankruptcy notice. Furthermore, the sum demanded in the notice was RM30,628.68 which was quantified up to 28 February 1987. The "further interest" claimed at the bottom of the notice did not render the notice defective. In *Re Farrugia supra*, the question for the Federal

Court of Australia to consider was whether a bankruptcy notice was defective if it claimed interest on a judgment debt to a date specified in the notice, which was earlier than the date of issue of the notice but did not in terms waive or abandon any claim for interest accruing after the date so specified. The bankruptcy notice, which was issued by the Deputy Registrar on 29 June 1987, claimed interest on the judgment debt on which it relied up to 26 June 1987 and did not in terms waive any claim for interest after that date. The Federal Court decided that the bankruptcy notice was not defective by reason only of the fact that it claimed interest to a date prior to the date of issue of the notice and did not in terms abandon or waive any claim for interest accruing after the date specified in the notice.

Mr. Ranjan in his submission cited two Australian cases, namely (1) *Re The Bankruptcy Act 1966; Ex parte Commercial Banking Company of Sydney Ltd*. 23 ACL 522 and *Re Sly; Ex parte Broadlands International Finance Ltd.* 79 ALR 681. The facts of the former case are different from the instant case. In that case the Court was concerned with the words "and no more" stated in the bankruptcy notice, which is not the case in the instant case. The other case, *Re Sly*, which was decided by one Judge, was overruled by *Re Farrugia, supra*.

In the circumstances I found that the bankruptcy notice in the instant case was not defective.

The second ground relied upon by Mr. Ranjan was that no act of bankruptcy had been committed by the applicant because on 3 November 1987 he had filed an application by notice of motion to set aside the bankruptcy notice. He referred to r. 95 of the Bankruptcy Rules and submitted that the hearing of the petition was a nullity and the receiving and adjudicating orders should be rescinded with costs.

Order 95(2) states that if an application to set aside the bankruptcy notice cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

In the present case, it will be recalled that the bankruptcy notice was issued on 7 October 1987. The applicant's affidavit in support of the application to set aside the bankruptcy notice stated that the notice was served on him on 30 October 1987. According to the bankruptcy notice the applicant must pay the judgment creditor RM30,628.68 within seven days after the service of the notice on the applicant. In other words the applicant must pay the sum demanded on or before 6 November 1987. The application to set aside the bankruptcy notice was filed on 3 November 1987 but the date of hearing of the application given by the Senior Assistant Registrar was 20 June 1988. There is no evidence that the applicant applied for extension of the seven days period as stated in the notice and there is no evidence that the Senior Assistant Registrar had granted such extension. On 20 June 1988 when the application came up for hearing in Court No. 2, the case was transferred to Court No. 4. The Senior Assistant Registrar fixed the date of hearing in Court No. 4 on 7 October 1988. On that date the applicant asked for time to settle the debt. He did not proceed to apply to set aside the notice. On 17 February 1988, the matter came up for hearing and the applicant again asked for adjournment. On 10 March 1989 the matter came up again for hearing and again the applicant asked for adjournment. On that date the application to set aside the bankruptcy notice was not mentioned at all. In the circumstances it was too late for the applicant to raise the issue of the hearing of his application to set aside the bankruptcy notice at the hearing of the application to rescind and annul the receiving and adjudicating orders. See *Ex parte May* [1884] 12 QBD 497.

In any event the affidavit in support of the application to set aside the bankruptcy notice

failed to disclose that the applicant had a counter claim, set off cross demand which was equal to or which exceeded the sum stated in the notice. In the said affidavit he averred that the judgment creditor had obtained judgment in default against the first defendant, NKM Credit Sdn. Bhd. in the same civil suit. He said that the first defendant had applied to judgment in default set aside. According to him "In the event the judgment in default is set aside, the said NKM Credit Sdn. Bhd. intends to file a counter claim against the judgment creditor". He said that he had a valid counter claim "... that may exceed the amount claimed by the judgment creditor through NKM Credit in respect of ..." another suit and in this suit. In the affidavit the applicant was referring to a possible counter claim by a third party. The Court was not satisfied that the applicant had a counter claim, set off cross demand against the judgment creditor. Since he failed to pay the sum demanded in the bankruptcy notice and since he had no counter claim, set off or cross demand, the applicant had committed an act of bankruptcy.

For the reasons stated above, I dismissed the motion with costs.

Also found at [1990] 1 CLJ 504